

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Jason B. and Kelli J. McClary's Application for Compensation from the Contractor Recovery Fund	ORDER ON CROSS MOTIONS FOR SUMMARY DISPOSITION
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This matter came before Administrative Law Judge Kathleen D. Sheehy on the parties' cross Motions for Summary Disposition filed on November 10, 2010. The OAH record closed on November 19, 2010, upon receipt of their responsive memoranda.

Christopher M. Kaisershot, Assistant Attorney General, appeared for the Department of Labor and Industry (Department). Anthony W. Thompson, Attorney at Law, appeared for Jason B. McClary and Kelli J. McClary (Applicants).

Based upon all the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. The Department's Motion for Summary Disposition is GRANTED;
2. The Applicants' Motion for Summary Disposition is DENIED; and
3. The Department's decision to deny recovery from the Contractor Recovery Fund is AFFIRMED.

Dated: December 10, 2010.

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 326B.89, subd. 8, this Order constitutes the final decision of the Commissioner of Labor and Industry in this matter. Judicial review of this Order shall be in accordance with sections 14.63 to 14.69.

MEMORANDUM

I. Factual Background

The material facts are not disputed. On March 4, 2009, the McClarys entered into a contract with Hardy Boys Construction, LLC (Hardy Boys) to install new exterior finishes on their home in Eagan, Minnesota.¹ The contract called for the installation of new siding, window trim, soffit, and shakes, for a contract price of \$9,600.² Work on the project began on March 24, 2009.³ Hardy Boys was a licensed residential building contractor when the work began; however, on March 31, 2009, the license expired, and it was not renewed.⁴

On April 10, 2009, the McClarys paid Hardy Boys \$7,500. On or about May 4, 2009, the McClarys paid Hardy Boys \$2,100, and they received from Hardy Boys an executed Receipt and Waiver of Mechanic's Lien Rights, which recognized full and final payment on the project.⁵

Despite having issued the Receipt and Waiver, Hardy Boys caused a mechanic's lien in the amount of \$10,368 to be filed against the McClarys' property on May 8, 2009.⁶ Because of the lien, the McClarys were unable to pay off their short-term construction loan and refinance the loan as they had planned. They incurred costs associated with the delayed closing. They were also forced to hire an attorney and file suit against Hardy Boys in Dakota County District Court to have the lien removed. In September 2009, the district court ordered a default judgment in the McClarys' favor in the amount of \$18,464.50. This amount represented \$755.50 for costs and disbursements; \$3,000 for attorney's fees; and \$14,709 in damages due to the delay.⁷

On June 14, 2010, the McClarys filed an application for compensation from the Contractor Recovery Fund.⁸ They sought recovery of \$14,709, representing that portion of the judgment that did not include costs or attorney's fees. By letter dated August 26, 2010, the Department denied the application for recovery on the basis that Minn. Stat. § 326B.89, subd. 6(3), precludes recovery for fraudulent conduct that occurred when

¹ Affidavit of Eileen McNiff Ex. 1; Affidavit of Kelli J. McClary ¶ 2 & Ex. A.

² *Id.*

³ Affidavit of Kelli J. McClary ¶ 3.

⁴ McNiff Aff. ¶ 3; Affidavit of Anthony W. Thompson Ex. A.

⁵ McNiff Aff. Ex. 6 at ¶¶ 7-9; McClary Aff. ¶¶ 4-6 & Ex. D.

⁶ McNiff Aff. Ex. 6 at ¶ 11; McClary Aff. Ex. E.

⁷ *Id.*, Ex. 6 at pages 3-4 & Notice of Docketing of Amended Judgment.

⁸ McNiff Aff. Ex. 7; McClary Aff. Ex. F.

the contractor was not licensed.⁹ The McClarys requested a hearing on the denial of the application.¹⁰

II. Motion for Summary Disposition

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.¹¹ The parties have agreed that there are no genuine issues of material fact and that this matter is amenable to summary disposition.

The purpose of the Contractor Recovery Fund is to compensate eligible homeowners and lessees who meet the requirements of the statute; to reimburse the Department for the legal and administrative expenses incurred in administering and defending the fund; to pay for educational or research projects in the field of residential contracting; and to provide information to the public on residential contracting issues.¹²

The Claimants bear the burden of proving their eligibility to recover from the Fund by substantial evidence.¹³ To be eligible, a homeowner or lessee must submit an application to the Commissioner and verify the following information, in relevant part:

- (1) the specific grounds upon which the owner or lessee seeks to recover from the fund;
- (2) that the owner or lessee has obtained a final judgment in a court or competent jurisdiction against a licensee under section 326B.83; [and]
- (3) *that the final judgment was obtained against the licensee on the grounds of fraudulent, deceptive, or dishonest practices, conversion of funds, or failure of performance that arose directly out of a contract directly between the licensee and the homeowner or lessee that was entered into prior to the cause of action and that occurred when the licensee was licensed and performing any of the special skills enumerated under section 326B.802, subdivision 19[.]*¹⁴

Whenever an applicant's judgment is by default, the applicant shall have the burden of proving the cause of action for fraudulent, deceptive, or dishonest practices, conversion of funds, or failure of performance.¹⁵ Whatever the nature of the

⁹ *Id.*, Ex. 8.

¹⁰ *Id.*, Ex. 9.

¹¹ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.

¹² Minn. Stat. § 326B.89, subd. 4 (2008). All citations to Minnesota Statutes are to the 2008 edition, unless otherwise noted.

¹³ *Id.*, subd. 8.

¹⁴ *Id.*, subds. 6(1)-(3) (emphasis added).

¹⁵ *Id.*, subd. 8.

misconduct, however, the statute requires applicants to show that it occurred when the contractor was licensed.

In this case, the Department does not dispute that the filing of a malicious lien is fraudulent, deceptive, or dishonest conduct that arises out of the contract; it maintains, however, that because the fraudulent, deceptive, or dishonest conduct occurred on May 8, 2009, when Hardy Boys was no longer licensed, the McClarys are not eligible to recover from the Fund. The Applicants have not alleged that the contractor committed any misconduct during the time when the contractor was licensed. Based on the plain language of the statute, the Department contends it is entitled to judgment as a matter of law. The Department also argues that, even if there were some ambiguity in the statutory language, the Department's interpretation of the statute to cover losses incurred only as a result of licensed conduct is entitled to deference.

The Applicants agree that the misconduct occurred when the contractor slandered the title to the property.¹⁶ They argue, however, that under Minn. Stat. § 514.05, subd. 1, the lien attached and took effect from the time the first item of material or labor was furnished on the project (March 24, 2009), when the contractor was still licensed.¹⁷ Because the contract was signed and some work was performed, and because the lien effectively attached on March 24, 2009, while the contractor was licensed, they argue that the contractor was licensed at all relevant times and that their application for recovery should be granted.

Minn. Stat. § 514.05, subd. 1, governs when a mechanic's lien attaches and provides for potentially different dates of attachment depending upon whether the person is the owner of the property, or a purchaser, mortgagee, or encumbrancer. It provides, in relevant part, that "[a]ll liens, as against the owner of the land, shall attach and take effect from the time the first item of material or labor is furnished upon the premises for the beginning of the improvement, and shall be preferred to any mortgage or other encumbrance not then of record, unless the lienholder had actual notice thereof." The lien ceases to exist within 120 days of performing the last work on the project, unless the lien holder files a statement of claim and serves a copy on the owner.¹⁸ The Applicants argue that, because the lien came into existence automatically upon the commencement of work, at a time when the contractor was licensed, it is irrelevant that the contractor was not licensed when it filed the statement of claim on May 8, 2009.

The Administrative Law Judge disagrees. In this case, the lien was created automatically when the contractor began work on March 24, 2009. The lien was extinguished on or about May 1, 2009, when the contractor provided the Applicants with a lien waiver acknowledging receipt of full payment for the work performed. The

¹⁶ See Plaintiff's Reply Memorandum at 1 (there is no question of defective work or damage resulting from the labor performed by Hardy Boys, but instead the damages resulting from its slander of title to the property).

¹⁷ Minn. Stat. § 514.05, subd. 1.

¹⁸ Minn. Stat. § 514.08, subd. 1.

misconduct that caused damage to the Applicants occurred on May 8, 2009, when the contractor filed the statement of claim asserting lien rights that had been discharged. At that time, the contractor was not licensed. Based on the plain language of the statute, the Administrative Law Judge concludes the Applicants are not eligible for compensation from the Recovery Fund.

This result, although unfortunate from the perspective of the Applicants, is entirely consistent with the legislative scheme. The Recovery Fund is created by fees assessed when residential building contractors apply for or renew their licenses.¹⁹ The amount of the fee depends on the amount of the contractor's gross annual receipts. It was accordingly a rational decision by the legislature to make eligibility for recovery contingent on the applicant demonstrating that the underlying misconduct was committed by a licensed contractor.

K.D.S.

¹⁹ Minn. Stat. § 326B.89, subd. 3.